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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 224

THE UNITED STATES, PETITIONER

v.

PROVIDENT TRUST COMPANY, AS ADMINISTRATOR OF the Estate of George Theodore Roberts, deceased

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 5–8) is reported in 2 F. Supp. 472.

JURISDICTION

The judgment of the Court of Claims was entered April 10, 1933. (R. 8.) The petition for a writ of certiorari was filed July 1, 1933 and the writ was granted October 9, 1933. (R. 10.) The jurisdic-

tion of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether medical testimony as to the incapacity of a woman to bear children is admissible to establish the right to deduct from the value of a testator's gross estate, under Section 403 (a)(3) of the Revenue Act of 1918, the value of bequests to charitable institutions limited upon the death of the testator's daughter without issue.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in Appendix A, *infra*, pp. 17–18.

STATEMENT

The Court of Claims made special findings of fact (R. 4–5) which may be summarized as follows:

George Theodore Roberts, a resident of the State of Pennsylvania, died testate in the year 1921. (R. 4.) In his will, after making certain bequests, he devised the residue of his estate to the respondent herein in trust to pay the income thereof to his daughter, Elizabeth Wentworth Roberts, during her natural life, and upon her death to her lawful issue; and it was further provided that in the event his daughter should die leaving no issue, the residuary estate should be distributed among certain charitable institutions and societies. (R. 4.) It is agreed that these institutions and societies are within the class of organizations bequests to which

are deductible from the gross estate of a decedent under the provisions of Section 403 (a)(3) of the Revenue Act of 1918. (R. 4.)

The testator left one child, Elizabeth Wentworth Roberts, who was born on June 10, 1871, and was 50 years of age at the time of her father's death. (R. 4.) On February 9, 1914, upon the advice of a gynecologist, she submitted to a surgical operation which resulted in the removal of the uterus, the Fallopian tubes and both ovaries. (R. 5.) After the operation it was impossible for her to become pregnant or give birth to a child. (R. 5.) She died on March 12, 1927, unmarried and without ever having given birth to a child. (R. 5.)

On November 30, 1927, the Orphans' Court of Philadelphia County, Pennsylvania, awarded the residue of the testator's estate, subject to payment of any transfer or inheritance taxes, to the organizations named in the will, as residuary legatees. (R. 5.)

The respondent was named as executor in the testator's will, which was duly probated on March 16, 1921. (R. 4.) Later, the respondent became administrator of the estate. (R. 4.) As executor, the respondent filed a Federal estate tax return and paid a tax of $5,353.70 on March 11, 1922. (R. 4.) The Commissioner of Internal Revenue subsequently imposed an additional tax of $20,701.89, which was paid by the respondent, together with interest thereon, on May 17, 1924. (R. 4.)

On August 4, 1927, the resopndent filed a claim for the refund of $18,404.05, or such greater amount as was legally refundable out of the taxes paid, on the ground that the value of the residual estate, less the value of the life estate, should have been allowed as a deduction. (R. 4.) This claim was rejected on March 2, 1928. (R. 2, 4.) Suit was brought in the Court of Claims on February 25, 1930.

The court below held that evidence of the incapacity of the life tenant to have issue was admissible and that in the light of such evidence the charitable bequests were not contingent but were certain to vest on the death of the testator's daughter. Judgment was accordingly entered for the respondent in the sum of $17,204.66, with interest.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In receiving medical testimony of the incapacity of the testator's daughter to bear children.

2. In holding, on the basis of incapacity of the testator's daughter to bear children, that deduction was allowable from the value of the testator's gross estate, under Section 403 (a)(3) of the Revenue Act of 1918, for bequests to charitable institutions upon the death of the testator's daughter without issue.

3. In giving judgment for the respondent.

SUMMARY OF ARGUMENT

The bequests were limited upon the death of the life tenant without issue. The evidence admitted was to the effect that at the time of the testator's death his daughter could never bear children. The overwhelming weight of authority in this country forbids the admission of evidence to show that a woman is incapable of bearing children so long as she lives. The rule, as stated, appears to admit of no exceptions. It has been sustained in the only other cases involving the question here presented.

The rule is based upon the unwillingness of the courts to examine the facts as to whether a woman is or is not capable of having issue. Every type of evidence is rejected whether it relates to old age, physical condition or surgery. The rule has its foundation in public policy and public morals, and a departure from it would tend to promote uncertainty and fraud. The court below was not justified in holding the rule to be inapplicable because of an apparent hardship that might result from its application in this case.

ARGUMENT

Section 403 (a) (3) of the Revenue Act of 1918 (*infra*, p. 17) and analogous provisions of other revenue statutes permit the deduction from the gross estate of a decedent, for the purpose of determining the net estate subject to tax, of the amount of bequests to charitable organizations. It

is well settled that the amount subject to tax is to be ascertained as of the date of the decedent's death (*Ithaca Trust Co.* v. *United States,* 279 U.S. 151) and that no deduction will be allowed for a charitable bequest dependent upon a condition unfulfilled at the date of the testator's death. *Humes* v. *United States,* 276 U.S. 487; Regulations 37, Art. 56, *infra,* p. 18.

The contingency in the instant case, the happening of which would, under the terms of the will, defeat the bequest to charities, is the death of the testator's daughter leaving issue. The court below concluded that at the date of the testator's death this contingency no longer existed because under the testimony of medical experts the daughter was then incapable of bearing children, so that the charities were certain to take upon her death. It accordingly held that the value of the charitable bequests as of the testator's death was deductible from the gross estate for the purposes of the estate tax.

The sole question presented is whether it was proper for the court below to admit and consider expert medical testimony that the testator's daughter had, prior to his death, submitted to an operation known as hysterectomy, which made it impossible for her thereafter to have children. The Government contended that a woman must be presumed to be capable of having issue so long as she lives, and that such presumption may not be rebutted.

The court, conceding that this rule exists in many jurisdictions, was of the opinion that the reasons usually given for holding the presumption to be conclusive were unsound and that, in any event, they were inapplicable to this type of case.

The overwhelming weight of authority in the United States holds that evidence is not admissible to show that a woman, after reaching adult age, is incapable of bearing children.[1] Whether the court uses the words "conclusive presumption of law", "presumption of law", or some other expression, the result is the same, the rule being one of substantive law rather than one governing the burden of proof or the duty of going forward with evidence.

With relatively few exceptions, the courts have regarded the principle as so firmly established that departures from precedent should be prohibited, if only for the sake of certainty and uniformity. Thus, in *In re Dougan*, 139 Ga. 351, 355, it was said:

> Whatever hardship may be worked in special instances, it would work great mischief if no settled rule existed to guide and

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[1] The American authorities are collated in Appendix B, *infra*, pp. 19–23. See also 48 L.R.A. (N.S.) 865; 67 A.L.R. 538; 23 Col. L. Rev. 50.

In England the same rule has been strictly enforced in cases involving the rule against perpetuities (*Jee* v. *Audley*, 1 Cox Ch. Cas. 324; *Griffiths* v. *Deloitte*, [1926] Ch. 56), but in distributing estates the courts have been more liberal when the proof of incapacity seemed persuasive and distribution would deprive no living person of a possible interest. *In re White*, [1901] 1 Ch. 570; *Carr* v. *Carr*, 106 L.T.Rep. 753. Cf. *Perkin* v. *Bland*, 122 L.T.Rep. 181.

> determine the decision of judges on such a subject, leaving each case to the varying impressions to be produced by testimony. * * *

For this reason, detailed analysis of the different situations in which the rule has been enforced would appear to be of little value here. It may be observed, however, that the presumption grew up and has been most frequently invoked in connection with the ascertainment of interests in property, both real and personal, and that in relatively few instances has occasion arisen for its application in other fields of the law. See Appendix B (*infra*, pp. 19–23) where we have classified the authorities according to the subject matter of the cases.

The cases holding that evidence can be admitted to show that a woman is in fact incapable of having issue are few. *Johnson, Moore's Ex'or* v. *Beauchamp*, 5 Dana (Ky.) 70, has not been followed by the courts of Kentucky. See *May* v. *Bank of Hardinsburg & Trust Co.*, 150 Ky. 136, and other cases cited in Appendix B (*infra*, pp. 19–23). *Male* v. *Williams*, 48 N.J.Eq. 33, has apparently not been regarded as controlling in other New Jersey cases, where the presumption has been held conclusive. See *Riley* v. *Riley*, 92 N.J.Eq. 465, and other decisions listed in Appendix B (*infra*, pp. 19–23). In *Gowen's Appeal*, 106 Pa. 288, the court allowed the distribution of an estate conditioned upon the posting of a bond to protect the rights of any afterborn children. In that case *List* v. *Rodney*, 83 Pa. 483,

was distinguished on the ground that it applied only to the question of ability to convey good and marketable title to real estate, but in *Sterrett's Estate,* 300 Pa. 116, the rule was again applied with respect to "the devolution of estates." *Miller* v. *Macomb,* 26 Wend. (N.Y.) 229, *Bacot* v. *Fessenden,* 130 App. Div. (N.Y.) 819, and *Whitney* v. *Groo,* 40 App.D.C. 496, were cases involving specific performance of contracts for the sale of real estate. It can be inferred from all of these cases that the courts concluded that the possibility of issue being born to a woman long past the age for child-bearing was too remote to render unmarketable the title offered by the vendor. In *Miller* v. *Macomb, supra,* the appellate court affirmed on the ground that the parties had agreed that the possibility of issue was extinct, but expressed disapproval of any assumption that capacity had ceased by reason of age. In *Bacot* v. *Fessenden, supra,* it also appeared that the vendee knew at the time of entering into the contract that the title to the property would be affected should issue thereafter be born to a woman thought to be past the age of child-bearing.

There are two cases in which the capacity of a woman to bear children has arisen in connection with tax matters. *Farrington* v. *Commissioner,* 30 F. (2d) 915 (C.C.A. 1st), certiorari denied, 279 U.S. 873; *Guaranty Trust Co.* v. *Commissioner,* 27 B.T.A. —, decided Jan. 31, 1933, now pending on

appeal to the Circuit Court of Appeals for the Second Circuit. Both cases involved the Federal estate tax, and in both the presumption of capacity was held to be conclusive and irrebuttable. (See also *Pennsylvania Co. etc.*, v. *Brown*, E. D. Pa., decided July 18, 1933, reported in Prentice-Hall Federal Tax Service, 1933, Vol. 1A, Par. 1761.) In the *Farrington* case the court said (pp. 915, 916):

> It is elementary that Congress, in the enactment of any statute, intends it to be construed according to existing law. Wherever such a case has been presented to any court within the United States, it has been ruled that there is a presumption that women are capable of childbearing so long as they live. * * *
>
> * * * * * *
>
> If the question whether a remainder bequeathed to a town for charitable or educational purposes is to be deducted from the gross estate in determining the net estate liable to an estate tax could only be determined by evidence as to whether a woman who was a life tenant could bear a child, her physical condition in many cases not the result of age might have to be investigated.
>
> We think it is in the interests of good morals and public policy that the rule which has been so universally acted upon and which was adopted by the Board of Tax Appeals should be followed in the determination of an estate tax.

The reasons usually given for excluding evidence of the incapacity of a woman to bear children are: (1) that the age at which ability to procreate ceases cannot be ascertained with any degree of certainty; (2) that the subject is one of such delicacy that it should not be investigated in judicial proceedings; (3) that consideration of such evidence might encourage the performance of surgical operations to prevent birth of issue; and (4) that the prevailing rule tends to eliminate confusion in titles to property.

In *Hill* v. *Sangamon Loan and Trust Co.*, 295 Ill. 619, 621–622, a decision which has been frequently cited, the court said:

> Nature has fixed no certain age, by years, at which child-bearing capacity shall begin or end. Any conjecture based on age is too doubtful and uncertain to result in any reliable conclusion. If it can be determined that the possibility of issue is extinct in a woman in one case it may in another. We may concede that these life tenants have passed the age to which the ability to bear children usually continues, but the law appears to have settled the question that there is no age beyond which child-bearing is impossible. We think this rule of law sound on moral grounds and on grounds of public policy. If the rule were otherwise, surgical operations might be resorted to to make it absolutely certain that no issue could be born. * * * It is obviously not the

> province of courts of justice, and especially courts of equity, to establish any precedent which would encourage fraud or immoral acts that would result in the defeat of a settlement or the termination of a trust. The law recognizes the possibility of issue in all adult women, and the single fact that terminates the ability to bear children is death.

It happens that the great majority of the cases wherein the presumption has been held conclusive involved only old age or the physiological changes incident thereto, but the rule makes no distinction between incapacity due to age and incapacity due to artificial causes. In two cases testimony has been offered to show that the capacity to bear children had been terminated by medical treatment. Both involved the same surgical operation as was proved here (hysterectomy), and in both the evidence was held inadmissible. *Byers* v. *Beddow*, 106 Fla. 166; *Guaranty Trust Co.* v. *Commissioner*, 27 B.T.A. —, *supra*. Precedent and public policy formed the basis of the decision in each instance. The Florida court quoted with approval from the opinion in *In re Ricards' Trust Estate*, 97 Md. 608, where the danger of improper surgical operations was stressed. The same case and *Hill* v. *Sangamon Loan and Trust Co., supra*, were cited by the Board of Tax Appeals, which said:

> It may be that the cases on this subject present no more than an alleged inability to bear children due to natural causes, but nevertheless the discussions of operations in the

above quotations do not constitute dicta. They express one of the reasons for the rule. The application of the rule may not depend upon when the woman underwent the operation, nor upon whether that woman is to share in the remainder. * * *.

In *In re Ricards' Trust Estate, supra,* the Court of Appeals of Maryland said (pp. 615, 616):

> *Physical conditions have been testified to by medical witnesses who have expressed the opinion that there was no possibility of the life tenant being the mother of children. Can such evidence be received in a Court of justice to affect the devolution of property or to divert the course marked out for it to follow?* The admission of such evidence in a case like this where the avowed purpose of the proceeding is to cut out or strike down an estate in remainder, would or might be productive of most disastrous results. If, because of physical degeneracy, atrophy or decay, a medical man may, in a controversy involving title to an estate, testify that a woman is incapable of bearing children, so that a trust deliberately created for her benefit during her life only, may be brought to an end with a view of vesting an absolute interest in her; or, so that the vesting of a remainder may be accelerated: no one can foretell to what lengths such a precedent would lead. A surgical operation extirpating the uterus, for instance, would make it absolutely certain that no issue could be borne. If proof like that now under con-

> sideration were admitted, upon what principle could evidence showing that an operation of the kind indicated had been performed, be excluded? And if not excluded what would prevent interested parties from resorting to such or similar operations, if by a resort to them a mere equitable life estate could be converted into an absolute interest? *It is wholly immaterial whether the inability to bear children arises from natural or from artificial causes. It is not the cause but the fact that alone controls the question and the single fact to which the law looks is death.* (Italics ours.)

Courts may well be reluctant to permit inquiry into matters so steeped in uncertainty as the question of the efficacy of the various methods used to destroy child-bearing capacity. For example, direct applications of X-rays or radium are frequently used for this purpose, but they may cause permanent or only temporary sterility depending upon the length of the exposure and the intensity of the treatment. Moreover, accidental sterilization of either patient or operator may result from the use of X-rays and radium for other purposes. See MacKee, *X-ray and Radium in the Treatment of Diseases of the Skin*, pp. 208–209; Clark and Norris, *Radium in Gynecology*, pp. 132–133. Whether sterility has resulted from accidental or intentional exposure to the rays cannot be definitely ascertained and the unreliability of testimony on this subject is enhanced when, as is frequently the

case, the question does not arise until some time after exposure has taken place. Likewise, certain surgical methods which have been employed to produce sterility have been found to be of doubtful efficacy, and in some instances the capacity to reproduce which has been only temporarily suspended may be subsequently restored. See Miller, *Clinical Gynecology*, pp. 269–270. It is, therefore, wholly within the realm of possibility that a life tenant who was considered incapable of bearing children at the time of the testator's death might later have offspring whose birth would defeat a contingent remainder. Medical testimony on matters of this kind is likely to be conflicting, and the substitution of prevailing medical opinion for the certainty of the present rule seems highly undesirable.

The courts of this country generally have considered the presumption to be of sufficient value to warrant them in adhering to it in the face of arguments in favor of its abandonment in individual cases. It has been felt that to permit an entering wedge in the form of exceptions to the general rule would have far-reaching consequences of an undesirable character. The court below was of the opinion that no harm could result from the admission of the evidence tendered. We submit, however, that the rule which has survived for many years should not be discarded upon a showing of hardship in individual cases.

CONCLUSION

We submit that the judgment of the Court of Claims should be reversed and the case remanded with instructions to dismiss the petition.

Respectfully submitted.

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NOVEMBER 1933.

APPENDIX A

Section 403 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1098–1099, provides in part as follows:

> That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> * * * * *
>
> (3) The amount of all bequests, legacies, devises, or gifts, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, or to a trustee or trustees exclusively for such religious, charitable, scientific, literary, or educational purposes. * * *

Treasury Regulations 37 provide in part as follows:

> ART. 53. *Public, charitable, and similar bequests.*—Bequests to religious, charitable, scientific, literary, or educational corporations are deductible only if the corporation is organized or operated exclusively for one of the purposes specified (see Art. 54).

Similarly, in the case of a trust, the trust must be exclusively for such purposes. It does not prevent deduction, however, that the property placed in trust is also subject to another trust for a private purpose. Thus, where money or property is placed in trust to pay the income to an individual during life, and then to pay or deliver the same to a charitable corporation, or apply the principal to a charitable purpose, the charitable bequest or devise forms the basis for a deduction. The amount of the deduction, in such case, is the value, at the date of the decedent's death, of the remainder interest in the money or property which is devised or bequeathed to charity. For the manner of determining the value of such remainder interest, see Article 20. Gifts made in the decedent's lifetime are deductible only if made in contemplation of death, or intended to take effect at or after death, and the property is consequently included in the gross estate. Gifts made in satisfaction of a legacy are also deductible. The deduction is not limited in the case of the estates of residents to bequests to domestic corporations or to trustees for use within the United States.

ART. 56. *Conditional bequests.*—Where the bequest, legacy, devise, or gift is dependent upon the performance of some act, or the happening of some event, in order to become effective it is necessary that the performance of the act or the occurrence of the event shall have taken place before the deduction can be allowed. Where, by the terms of the bequest, devise or gift, it is subject to be defeated by a subsequent act or event, no deduction will be allowed.

APPENDIX B

AMERICAN AUTHORITIES ON THE QUESTION OF CAPACITY OF A WOMAN TO BEAR CHILDREN SO LONG AS SHE LIVES

The following cases involved the rule against perpetuities, it being held that remoteness could not be avoided by allegation, agreement or proof that a woman was, by reason of age, incapable of bearing children:

CONNECTICUT:

White v. *Allen*, 76 Conn. 185 (1903)

DELAWARE:

Taylor v. *Crosson*, 11 Del. Ch. 145 (1916)

INDIANA:

Reasoner v. *Herman*, 191 Ind. 642 (1922)

KENTUCKY:

Beall v. *Wilson*, 146 Ky. 646 (1912)

Brown v. *Columbia Finance & Trust Co.*, 123 Ky. 775 (1906)

Tyler v. *Fidelity & Columbia Trust Co.*, 158 Ky. 280 (1914)

U.S. Fidelity & Guaranty Co. v. *Douglas' Trustee*, 134 Ky. 374 (1909)

MASSACHUSETTS:

Lovering v. *Lovering*, 129 Mass. 97 (1880)

MICHIGAN:

Gettins v. *Grand Rapids Trust Co.*, 249 Mich. 238 (1930)

Rozell v. *Rozell*, 217 Mich. 324 (1922)

MISSOURI:

Loud v. *St. Louis Union Trust Co.*, 298 Mo. 148 (1923)

NEW JERSEY:

Graves v. *Graves*, 94 N.J.Eq. 268 (1923)

Stout v. *Stout*, 44 N.J.Eq. 479 (1888)

In the following cases involving determination of title and the right to distribution or partition under wills and deeds the presumption in favor of child-bearing capacity was held to be conclusive:

ARKANSAS:
Bowen v. *Frank*, 179 Ark. (2d) 1004 (1929)
GEORGIA:
Williams v. *Frierson*, 150 Ga. 797 (1921)
ILLINOIS:
Dustin v. *Brown*, 297 Ill. 499 (1921)
Hill v. *Sangamon Loan & Trust Co.*, 295 Ill. 619 (1920)
Hill v. *Spencer*, 196 Ill. 65 (1902)
INDIANA:
Burrell v. *Jean*, 196 Ind. 187 (1925)
KENTUCKY:
Futrell v. *Futrell's Executor*, 224 Ky. 814 (1928)
Rand v. *Smith*, 153 Ky. 516 (1913)
MARYLAND:
Williams v. *Armiger & Bro.*, 129 Md. 222 (1916)
NEW JERSEY:
Riley v. *Riley*, 92 N.J. Eq. 465 (1921)
PENNSYLVANIA:
Gowen's Appeal, 106 Pa. 288 (1884)
Sterrett's Estate, In re, 300 Pa. 116 (1930)
TENNESSEE:
Bigley v. *Watson*, 98 Tenn. 353 (1897)
Frank v. *Frank*, 153 Tenn. 215 (1925)
Jordan v. *Jordan*, 145 Tenn. 378 (1922)

The presumption was regarded as conclusive, except as otherwise noted, in the following cases involving the termination of trusts:

CALIFORNIA:
Fletcher v. *Los Angeles Trust & Savings Bank*, 182 Cal. 177 (1920)
DELAWARE:
Du Pont v. *Du Pont*, 159 Atl. 841 (1932)
FLORIDA:
Byers v. *Beddow*, 106 Fla. 166 (1932)
GEORGIA:
Dougan, In re, 139 Ga. 351 (1913)
KENTUCKY:
Allen v. *Allen's Trustee*, 141 Ky. 689 (1911)
Bailey's Trustee v. *Bailey*, 30 Ky. L. Rep. 127 (1906)
May v. *Bank of Hardinsburg & Trust Co.*, 150 Ky. 136 (1912)
Quigley's Trustee v. *Quigley*, 161 Ky. 85, rehearing denied, 162 Ky. 754 (1914)
MARYLAND:
Ricard's Trust Estate, In re, 97 Md. 608 (1903)
MASSACHUSETTS:
Towle v. *Delano*, 144 Mass. 95 (1887)
NEW JERSEY:
Smith, Application of, 94 N.J.Eq. 1 (1922)
RHODE ISLAND:
Bowlin v. *Rhode Island Hospital Trust Co.*, 31 R.I. 289 (1910)
TENNESSEE:
Bearden v. *White*, 42 S.W. 476 (1897)
Garner v. *Dowling*, 58 Tenn. 48 (1872)
Read v. *Fite*, 8 Humph. 328 (1847)
TEXAS:
Reeves v. *Simpson*, 182 S.W. 68 (1915)
WEST VIRGINIA:
Carney v. *Kain*, 40 W.Va. 758 (1895)

In the following cases it has been held that the presumption in favor of issue made it impossible for a vendor to convey clear title, and specific performance was denied:

ILLINOIS:

Weberpals v. *Jenny,* 300 Ill. 145 (1921).

KENTUCKY:

Aulick v. *Summers,* 186 Ky. 810 (1920).

Azarch v. *Smith,* 222 Ky. 566 (1928).

Brown v. *Owsley,* 198 Ky. 344 (1923).

MISSOURI:

Rozier v. *Graham,* 146 Mo. 352 (1898).

NORTH CAROLINA:

Shuford v. *Brady,* 169 N.C. 224 (1915).

PENNSYLVANIA:

List v. *Rodney,* 83 Pa. 483 (1877).

The following cases involved suits under acts providing for sale of land under special circumstances:

Apgar, In re, 37 N.J.Eq. 501 (1883)—Suit under statute permitting sale of land subject to contingent limitations; *held* that probability of incapacity at age 58 would not defeat the court's jurisdiction. Reversed on other grounds, *sub. nom. Apgar* v. *Apgar,* 38 N.J.Eq. 549.

Clement, In re, 57 Atl. 724 (N.J.).

Westhafer v. *Koons,* 144 Pa. 26 (1891)—Statute permitting sale of land subject to contingent remainder; *held,* in effect, that the contingency, although remote, formed the basis of the action.

In the following cases the presumption was discussed in connection with the determination of the intent of a testator.

Ansonia National Bank v. *Kunkel,* 105 Conn. 744 (1927)—*held* that the presumption that testatrix's sister might have chil-

dren, although aged 61 at the date of the will, cannot be used to show that the testatrix meant by "issue" of the sister issue of her body to the exclusion of an adopted child.

Oleson v. *Somogyi,* 93 N.J.Eq. 506 (1921)—lower court held that since the testatrix who had one child, was too old at the date of the will to have more, the words "next of kin", being plural, must have referred to persons other than the child. Affirmed on other grounds, the above statement being disapproved.

Flora v. *Anderson,* 67 Fed. 182 (C.C., S.D. Ohio.)—presumption held conclusive where it was sought to show that an illegitimate child of the daughter should take as "issue" because at the date of the will the daughter was 50 and had no legitimate children.

The presumption was also discussed in the following miscellaneous decisions:

Sims v. *Birden,* 197 Ala. 690 (1916), where the question was whether complainant was the daughter of X, who would have been 50 at the date of complainant's birth, and the court said there was no presumption of *incapacity* at age 50.

State v. *Lash,* 16 N.J.L. 380 (1838), where it was suggested that an action for adultery at common law could not be defeated by proof that the woman was past the age of procreation, since she would be presumed capable of bearing children until she died.

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